In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 453

JOHN McMILLAN GREGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on June 18, 1968. A petition for rehearing was denied on July 26, 1968. The petition for a writ of certiorari filed on August 28, 1968, is out of time under Rule 22-2 of the Rules of this Court. There is, in any event, no occasion for review by this Court.

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted under an indictment which charged

that he had robbed the custodians of a post office and put their lives in jeopardy by the use of a dangerous weapon, in violation of 18 U.S.C. 2114. On May 31, 1967, he was sentenced to imprisonment for twenty-five years, a mandatory sentence set by the statute.

The evidence showed that on July 11, 1966, at about 3:30 p.m., two men, armed with guns, robbed a contract station of the post office in Louisville, Kentucky of $488.60 and twenty-one blank money orders. One of the robbers, identified at the trial as petitioner, admonished one of the two women in the station "One false move out of you, I'll blow your brains out." (G.A. 22-30). One week later, petitioner was arrested for another crime at an Indianapolis motel. He was found hiding in a closet with a canvas bag containing eighteen of the postal money orders stolen from the postal station and a pistol (G.A. 73-76).

1. After the return of the verdict, the jury was polled. The court then called petitioner forward for sentencing and advised him that the statute provided for a mandatory twenty-five year sentence. Defense counsel requested a brief stay to permit petitioner a visit with his wife and family. When he then requested a pre-sentence investigation, the court replied: "A pre-sentence investigation has been made. It is before me now, and I have read it." The court then recited petitioner's past criminal violations as shown by the pre-sentence report and, following this, imposed sentence.

We should not lightly assume that the trial court considered the presentence report prior to the return of the guilty verdict, contrary to the requirements of

Rule 32(c)(1).[1] The court might have scanned the report while the jury was being polled and counsel was requesting a delay in the imposition of sentence. Moreover, if the trial judge did read the report in advance of the guilty finding, it was most probably while the jury was considering the question of guilt. As the Seventh Circuit held in *Calland* v. *United States*, 371 F.2d 295, certiorari denied, 388 U.S. 916, violation of the rule at this time could be no more than technical; where all the evidence had been concluded, and the fact of the defendant's guilt was obvious and apparent to all, a court may "reject the inference that [an] inadvertently premature examination of the probation report at the stage of the proceeding when the defendant had not yet been found guilty in any way contributed to or influenced that finding." 371 F.2d at 296. Indeed, even assuming that the trial judge might have read the report in advance of charging the jury, petitioner's counsel—who also represented him at trial—failed to object then and fails to suggest now how specific prejudice might have occurred. Any error here is far less serious than the *ex parte* interviews with government witnesses in advance of adjudication of guilt which occasioned the comment of Mr. Justice Clark in *Smith* v. *United States*, 360 U.S. 1, 17-18 (concurring opinion), and does not rise to the

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[1] Rule 32(c)(1) provides in pertinent part:

> "The [presentence] report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty."

The rule by implication anticipates that pre-sentence reports will be made in advance of verdict.

level of "plain error," Fed. R. Crim. P. 52(b). Thus, the question what remedy might be appropriate for a violation of the rule is not suitably presented.[2]

2. Petitioner's challenge to the jury charge in his case is inappropriate for review in this Court. In any event, it is without merit.

In its charge, the court read the substance of the indictment, stating: "It is charged that on or about the 11th day of July at Louisville that the defendant made an assault on Mrs. Effie R. Smith and Mrs. Grace Smith, persons having legal charge, control and custody of the United States Post Office here at 1612 Bardstown Road with intent to rob, steal and purloin mail matters, money and other property which were then in the charge, control and custody of the said Mrs. Smiths, and in attempting to effect such robbery John McMillan Gregg [petitioner] put the life of Mrs. Effie R. Smith and Mrs. Grace Smith in jeopardy by the use of a dangerous weapon, a hand-held firearm * * *.

"Now, ladies and gentlemen, if you believe from the evidence that this defendant is guilty beyond a reasonable doubt of this charge, you shall say so by your verdict. If you do not so believe, you shall acquit him." (G.A. 95-96) ("Reasonable doubt" had been previously defined). Petitioner's counsel then made objections and thirteen requests to charge, none of which related to his present complaint that the jury

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[2] At all events, there is no occasion to direct a new trial. Although we believe such a hearing is not warranted here, petitioner's claim, at most, suggests a remand to the district court for inquiry into the precise factual circumstances of the reading and the question of possible prejudice.

was not advised as to the elements of the offense. Accordingly, the present objection is foreclosed, Fed. R. Crim. P. 30. In any event, the charge informed the jury, with appropriate reference to the facts of the case, that they must determine (1) that the assaulted persons were custodians of a post office; (2) that the petitioner assaulted them with intent to steal mail matters; and (3) that, in attempting to effect such robbery, petitioner put their lives in jeopardy by use of a dangerous weapon. Thus, all required elements were touched on. Granted the general proposition for which the cases petitioner cites stand—that the charge must not leave jurors in ignorance or to conjecture as to what they must find—application of this proposition is basically a factual matter, depending upon the circumstances of each case. Such inquiry is appropriate to the courts of appeals, and was made in this case. In the absence of any constitutional or other special reason giving prominence to petitioner's claim, there is no occasion for further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1968.

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